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No. 92-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. Ohio Power's attempt to re-write, and thereby implicitly disavow, the central holding of the court of appeals on remand is as disingenuous as it is unavailing. Contrary to the repeated assertion, the decision below did not simply "turn[] on the meaning of four SEC orders . . . of no general legal significance." Opp. at 3, 17 (citations omitted). Nor is it true that the lower court engaged strictly in a "cost-trapping" analysis that "did not rest on [§ 13(b) of PUHCA], or even on the SEC's regulations implementing it." Opp. at 17.

The court of appeals could not have made plainer that, in its view, reversal of the FERC's rate determination was required not because of the language of four SEC staff orders, but because of "the plain language of the *statute* authorizing the SEC to regulate sales contracts of associate companies[,] Section 13(b) of the PUHCA." Pet. App. 11a (emphasis added). The court of appeals resolved the conflict it perceived between the regulatory efforts of the FERC and the SEC by looking to "the SEC's specific *statutory* mandate" and by concluding that it was a more "specific articulation of [Congress's] policies and preferences" than the FERC's "general charge to establish 'just and reasonable' wholesale electric rates." *Id.* (emphasis added). Based on its examination of these *statutory* provisions, the court explicitly held

> that Congress *in § 13(b) of the PUHCA* authorized the SEC to set the price of SOCCO coal "at cost," and *in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.*

Id. at 12a (emphasis added). Lest there be any doubt, the court below restated the statutory basis of its decision just two pages later, "hold[ing] that the SEC properly discharged its authority under § 13(b) of the PUHCA . . . and that FERC must respect this *specific grant of authority to the SEC.*" *Id.* at 15a (emphasis added).

Ohio Power's attempt to disguise the decision below as a straightforward application of the "cost-trapping" principles announced in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), founders on a simple fact that respondent completely ignores. Merely determining that two federal agencies are regulating activities in a manner that possibly results in trapped costs [1] simply raises, but does not answer, the question of which agency's authority is paramount. Because *Nantahala* and *Mississippi Power & Light* involved conflicts between federal and state agencies, the Supremacy Clause dictated that the states' regulatory efforts must yield. The Supremacy Clause, however, plays no role in resolving a "conflict" between two federal agencies. Accordingly, the court's determination that FERC cannot disallow inter-affiliate costs that are the subject of SEC staff orders necessarily rested on the court's judgment that § 13(b) of PUHCA always takes precedence over FERC's rate-setting authority under the FPA. That *holding* warrants this Court's review.

2. Not only is it impossible to disguise the sweep of the lower court's statutory ruling, it is equally impossible to reconcile that ruling with this Court's decision on remand in *Arcadia* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990).

a. Respondent argues that, in its remand, this Court did nothing more than ask the lower court to apply the rationale of the cost-trapping prohibition developed in *Nantahala* and *Mississippi Power & Light*. Opp. at 19. But, as just noted, those cases, which involved state/federal conflicts, cannot determine the outcome of an intra-federal conflict—a fact this Court recognized through its "Cf." cite to *Nantahala*. See 111 S. Ct. at 422. More-

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[1] As petitioners demonstrate below, in fact the FERC's rate order does not trap any costs within the meaning of this Court's prior decisions. *See infra*, p. 3.

over, it is undisputed that the SEC staff orders did not require respondent to purchase a single ounce of coal from SOCCO. Accordingly, the essential predicate upon which this Court based its findings of cost trapping in *Nantahala* and *Mississippi Power & Light*—*mandatorily*-incurred costs that a subsequent regulator will not allow to be recouped—is wholly lacking here. See Pet. at 19-20.[2]

Rather than remand for the fashioning of a statutorily-based rule of cost-trapping preemption, this Court called on the lower court to determine whether the FERC-prescribed rate is not "just and reasonable" because it may "disregard[] a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO." 111 S. Ct. at 422. Such an inquiry should have focused on the extent to which FERC, in exercising its authority under Sections 205 and 206 of the FPA, could or should have departed from its comparable market test in light of any justifiable reliance Ohio Power may have placed on the SEC staff orders.[3] Instead, at Ohio Power's urging and over the objections of petitioners,[4] the court did

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[2] No doubt for these very reasons, the court of appeals itself made only one passing reference to just one of the two decisions that respondent now claims governed the disposition of this case on remand. *See* Pet. App. at 11a.

[3] As the municipalities noted in their petition, FERC did in fact consider respondent's reliance interest in the order under review here. *See* Pet. at 19 n.12.

[4] Among respondent's more egregious mischaracterizations is its contention that the lower court based its decision on the issues *petitioners* proffered below. The municipalities stated emphatically that "all arguments that the FERC's order is categorically barred by the statutory scheme [of PUHCA], are *beyond the scope of the Supreme Court's remand order.*" Intervenors' C.A. Brief at 7 n.5 (emphasis added). Similarly, contrary to respondent's suggestion (*see* Opp. at 19 n.18), the municipalities did argue below that § 13(b) does nothing more than authorize affiliate transactions that would otherwise be illegal, noting that "[w]hat section 13(b) actually does is prohibit all affiliate contracts unless they comply

not consider whether FERC had properly exercised its statutory authority, but rather concluded that FERC was stripped of that authority by virtue of § 13(b).

b. This ruling not only exceeded the scope of the remand, it is flatly inconsistent with this Court's decision in *Arcadia*. As petitioners previously explained (Pet. at 16-17), this Court determined that Section 318 of the FPA preempts FERC's authority *only* where the two agencies both regulate a subject matter falling within one of four specifically enumerated areas of plainly parallel authority under PUHCA and the FPA. See 111 S. Ct. at 419. It necessarily follows, therefore, that, to the extent other unidentified conflicts arise, FERC is not divested of its authority by virtue of any other parallel authority the SEC may possess under PUHCA.

Unable to dispute this reading of *Arcadia*, respondent attempts to belittle it, arguing that "a remand would have been pointless if there were any basis for the Municipalities' contention." Opp. at 21 n.20. But, to the contrary, it is the court of appeals' determination that § 13(b) ousts FERC of all authority over costs that rendered entirely "pointless" this Court's instruction to determine whether the "*FERC*-prescribed rate" (111 S. Ct. at 422 (emphasis added)) is "just and reasonable." [5]

3. The lower court's sweeping statutory ruling plainly warrants this Court's review. The decision below effectively eliminates FERC jurisdiction over the wholesale rate consequences of all inter-affiliate transactions involving the sale of goods or services. Respondent's repeated suggestion that the presence of SEC orders "pre-

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with conditions and limitations established by the SEC." Intervenors' C.A. Brief at 4.

[5] Indeed, Ohio Power admits elsewhere that, under the court of appeals' ruling, FERC is reduced from a prescriber of rates to an SEC enforcement adjunct. *See* Opp. at 23 (FERC retains authority "to ensure that the utility collects no more than the SEC-authorized price").

scribing" a cost-based standard somehow renders this case unique or minimizes the significance of the ruling below (see, *e.g.*, Opp. at 17-18 & n.17) is manifestly wrong. Under § 13(b), utilities cannot enter into inter-affiliate transactions unless they obtain SEC approval. Such approval, moreover, must, as in this case, "insure that [inter-affiliate] contracts are performed economically and efficiently for the benefit of such associate companies *at cost* . . . ." 15 U.S.C. § 79m(b) (emphasis added). It was on the strength of this statutory requirement—and not any SEC "determination" (see Opp. at 18 n.17)[6]—that the lower court read the SEC staff's orders as prescribing an "at-cost" pricing standard. See Pet. App. 14a (finding that the SEC orders "are better read as requiring Ohio Power to pay a price 'equal to cost' for SOCCO coal, *as prescribed by § 13(b)*") (emphasis added). Because staff orders routinely incorporate boilerplate references to this statutory language, the costs incurred in virtually all inter-affiliate transactions are, under the lower court's ruling, immune from FERC review in wholesale rate proceedings.

By immunizing such costs, which in this case account for 50 percent of the total cost of Ohio Power's wholesale electricity, the decision below re-opens precisely the same regulatory gap that moved this Court to review the court of appeals' prior opinion. Indeed, respondent's suggestion that "[t]he 'gap' of which Petitioners complain in fact

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[6] Respondent's description of the SEC staff orders as "determinations" and pricing "prescriptions" flies in the teeth of the lower court's earlier recognition that, in issuing the orders, the SEC staff conducted "no hearings and [made] no findings" (*Ohio Power Co.* v. *FERC*, 880 F.2d 1400, 1404 (D.C. Cir. 1989), *cert. granted*, 494 U.S. 1055 (1990)), and that none of the orders "describes any element of costs other than the cost of capital." *Id.* at 1408. Thus, there is nothing unique in the orders in this case that distinguishes them from any other inter-affiliate transaction approved by the SEC over the past 57 years—a fact that explains the presence as *amici* in this proceeding of the National Association of Regulatory Utility Commissioners and other state agencies that lack any immediate stake in the four SEC orders involved in this case.

is completely filled by the SEC" (Opp. at 22), is *precisely* the same argument it made in its unsuccessful opposition to the petition for review of the earlier decision. See Brief in Opposition, No. 89-1283, at 9 ("There is no gap, substantial or otherwise, because the SEC exercises plenary review over transactions between affiliates of a public utility holding company").[7] This Court properly rejected that argument last time, and should do so again here.

As petitioners have previously shown, the SEC's statutory mandate is far different from that of FERC. The SEC itself has repeatedly acknowledged that it has "no power over the [] dealings [of electric utilities regulated under PUHCA] with their customers, retail or wholesale." *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978).[8] Moreover, it has no expertise in setting or assessing wholesale electric rates; no statutory or administrative procedures by which customers can initiate a complaint[9]; and no clear authority to order refunds for overcharges if a utility is found to have violated its regulatory requirements. By contrast, under the decision below, FERC, which possesses the necessary regulatory expertise and powers, has been stripped of its core duty to prescribe rates and relegated to "advis[ing] the SEC of its views" and enforcing SEC cost prescriptions. Opp. at 23. This subversion of Congress' carefully crafted regulatory scheme clearly warrants further review.

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[7] *See also* Brief in Opposition, No. 89-1283, at 9 ("The issue in this case is not the creation of a 'regulatory gap'; the SEC regulates transactions between affiliates in holding companies").

[8] *Accord In re Louisiana Power & Light Co.*, 26 S.E.C. Docket 1257, 1263 (1982); *In re New England Elec. Sys.*, 24 S.E.C. Docket 229, 235 (1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974).

[9] Contrary to respondent's suggestion (*see* Opp. at 24 n.24), § 18(b) of PUHCA does not provide for initiation of investigations at the behest of customers, nor does it grant the SEC the authority to investigate the propriety of wholesale rates.

4. Equally flawed is respondent's suggestion that review of the important issues raised by the decision below can be postponed until FERC "clear[s] away the impediment posed by its own regulation"—*i.e.*, Section 35.14(a)(7). Opp. at 13. This argument depends on respondent's mischaracterization of the decision below as a narrow, transaction-specific cost-trapping determination. In fact, because the court of appeals announced a broad statutory ruling that effectively precludes FERC from reviewing the wholesale rate consequences of all inter-affiliate transactions subject to SEC approval under § 13(b), FERC has absolutely no reason to revise its regulation. Indeed, respondent's suggestion that the statutory issue petitioners proffer may arise in another case rests on the remarkable supposition that FERC will revise its regulation and then, in open defiance of the District of Columbia Circuit, disallow precisely those costs that the court has ruled FERC lacks authority to review. The suggestion is absurd and ignores FERC's decision to petition for certiorari. Because FERC is expected to abide by the decisions of the D.C. Circuit, the statutory question raised by the decision below will escape review altogether if not addressed in this case.

5. In any event, the independent basis for the lower court's ruling is patently erroneous and independently worthy of review.

a. Ohio Power argues that the court of appeals correctly held that § 35.14(a)(7) conclusively prevents FERC from disallowing fuel charges that are based on costs subject to SEC jurisdiction. Respondent defends this regulatory interpretation based on the "weight of authority" construing the word "deemed" in entirely different contexts. But this argument skips over a prior essential step in the interpretive process, which is to determine the ordinary meaning of the term. No dictionary defines "deem" to include a conclusive determination. Instead, its conventional meaning is "to come to think or judge." Webster's Dictionary 332 (9th ed. 1984).

The term does not denote an irrebuttable conclusion, but simply the forming of an opinion. It is inherently ambiguous on the question of whether a "deemed" fact may be subject to reevaluation.

Thus, Ohio Power must demonstrate that the inherently ambiguous meaning of the term has been rendered completely unambiguous by judicial interpretation. This is a burden Ohio Power cannot even begin to shoulder. The rule is clear that the term has different meanings depending on the context in which it is used.[10] As petitioners have demonstrated previously, however, the relevant phrase is not merely the word "deemed," but FERC's use of the phrase "deemed to be reasonable and *includable*." 18 C.F.R. § 35.14(a)(7) (emphasis added). Because this phrase does *not* track the statutory definition of legal rates—*i.e.*, those that are "just and reasonable"—it cannot give rise to the conclusive presumption of legality that the court below found.

Respondent, moreover, does not even attempt to reconcile the lower court's interpretation with FERC's longstanding practice of investigating costs passed through fuel adjustment clauses (see Pet. at 22 & n.15) or with FERC's mandate, under § 205(f) of the FPA, to "cease any practice in connection with the [fuel adjustment]

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[10] Although interpretations of the term "deem" in unrelated statutes provide little, if any, guidance as to its meaning in other contexts, it is worth noting that respondent's description of the weight of authority is inaccurate. Respondent relies on *H.P. Coffee Co.* v. *Reconstruction Fin. Corp.*, 215 F.2d 818 (Emer. Ct. App. 1954), for the proposition that courts have "almost unanimous[ly]" construed the term to create a conclusive presumption. One year earlier, however, the Supreme Court of Utah explained that " 'deem' and 'deemed' when used in statutes have been construed to establish a conclusive presumption in some instances, but only a rebuttable presumption in other cases, depending largely upon the context in which they are used," and went on to find a rebuttable presumption in the statute before it. *Brimm* v. *Cache Valley Banking Co.*, 269 P.2d 859, 863 (Utah 1953). Nor has respondent accounted for such findings in more recent decisions. *See, e.g., D&B Coal Co.* v. *Farmer*, 613 S.W. 2d 853, 854 (Ky. 1981).

clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause." 16 U.S.C. § 824d(f)(3). Nor can respondent offer any plausible explanation for why FERC would have unilaterally divested itself of all jurisdiction to review what is often the largest component of fuel costs. Its suggestion that FERC would choose "to 'abide by the determination' of another agency that has passed on the price paid in an affiliate fuel transaction" (Opp. at 15 n.12 (citation omitted)) ignores the fact that the regulation applies whenever the affiliate price is simply "subject to the jurisdiction of [another] regulatory body" (18 C.F.R. § 35.14(a)(7)), and thus is not limited to instances in which another agency has actually made any determination. More importantly, because the SEC does not make *rate* determinations, FERC has no reason to presume that SEC-approved costs will *invariably* yield just and reasonable wholesale rates.[11]

Finally, respondent fails to explain how a conclusive presumption comports with the final sentence of the regulation, which provides that FERC may investigate and suspend fuel adjustment clauses when "[f]uel charges by affiliated companies . . . do not appear to be reasonable." 18 C.F.R. § 35.14(a)(7). Respondent's contention that this sentence applies only to affiliate purchases that are not subject to regulatory authority (Opp. at 15 n.12) ignores the penultimate sentence, which already provides for suspension of rates resulting from contracts that are not subject to regulatory authority. Indeed, the last sentence carefully omits the reference to

[11] This case illustrates the point as well as any. Here the SEC approved financing transactions between 10 and 20 years ago with boilerplate "at cost" language in the staff's orders. Those orders did not require any coal actually to be purchased by Ohio Power from SOCCO. The idea that this sort of review is designed to provide consumers of electricity with assurances that their rates are just and reasonable is absurd on its face.

"such contracts" that appears in the two earlier sentences dealing with such situations.

b. Contrary to respondent's claim, the lower court's misreading of FERC's regulation does have broad significance. Not only does this regulatory ruling place in jeopardy the municipalities' recovery of millions of dollars in electric charges that FERC has declared unjust and unreasonable, it represents a transparent attempt by a reviewing court to impose a policy judgment on an agency that has, for eminently sound reasons, chosen to make a different policy choice. Judicial deference to agency interpretations is at its greatest when the agency construes its own policy-based regulation. Cf. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (noting heightened deference where agency interpretation of a statute requires "reconciling conflicting policies") (citation omitted). Plainly distrustful of FERC's ability to determine the weight to be accorded the SEC staff orders and any reliance Ohio Power may have placed on them, the court of appeals has instead interpreted FERC's own regulation (along with two statutory provisions) to strip the agency of its broad powers under Sections 205 and 206 of the FPA to set just rates. This extraordinary attempt to override an agency's authority—which is most starkly revealed in the lower court's tortured analysis of § 35.14(a)(7)—involves far more than an insignificant dispute over the meaning of a rarely-litigated regulation. It involves a fundamentally flawed method of judicial review of an agency regulation that clearly warrants review by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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